

Unless this requirement is complied with no Court is entitled to make an order, however much it is persuaded that it is reasonable to do so, and though as in this case the learned Judge who tried the case finds it reasonable there was in their Lordships' view no evidence of suitable alternative accommodation.

In the present case therefore as they have indicated their Lordships are of opinion that the existence of suitable alternative accommodation has not been established. They will accordingly humbly advise Her Majesty that the appeal should be dismissed. The appellants must pay the costs of the proceedings before their Lordships' Board.

Appeal dismissed.

W. A. BALCH v. NIPPON YUSEN KAISHA

[O.C.J. (Brown, J.) July 24, 1953]

[Singapore — Suit No. 1447 of 1952]

Negligence — Invitee — Failure to give reasonable warning regarding the dangerous position of gangway — No lack of reasonable care on the part of the invitee — Doctrine of Common Employment — Merchant Shipping Ordinance (Cap. 150), s. 396(f) — Position of a Pilot in the Singapore Pilot Association defined.

The plaintiff, who was a pilot, was asked by the defendants to navigate their ship. He fell while ascending the gangway and suffered injuries. He alleged that the defendants' servants were negligent and claimed damages as an invitee.

Held: (1) — (a) the gangway was in an unsafe condition owing to the lashing ropes having been unfastened, (b) no effective warning was given to the plaintiff, (c) in failing to give the plaintiff warning at a time when the gangway was not properly secured (the lashing ropes not being fastened) the defendants' servants were guilty of negligence, (d) the plaintiff shewed no lack of reasonable care in failing to see that the lashing rope was not fastened or that the gangway was not properly secured; (2) by virtue of section 396(f) of the Merchant Shipping Ordinance (Cap. 150) the pilot is compelled by law to take charge of a ship when required to do so; (3) the Doctrine of Common Employment does not apply; (4) the plaintiff is entitled to damages, which remained to be assessed.

Cases referred to:—

- (1) *Smith v. Steele* L.R. 10 Q.B. 195.
- (2) *Thom v. Hutchinson Ltd.* (1925) S.C. 386.
- (3) *Kelley v. Shamrock Shipping Co.* 47 Ll. List L.R. 33.
- (4) *Barrington v. Kent* (1947) 2 All E.R. 782.
- (5) *Alan France v. "Polartank"* (1949) L.J. 423.

CLAIM IN DAMAGES.

Dr. C. H. Withers-Payne for the plaintiff.

K. Gould (F. W. Cashin with him) for the defendants.

Brown, J.: — On the 11th of July 1952 the plaintiff, who was a licensed pilot and a member of the Singapore Pilot Association, was ordered to proceed to the defendants' vessel, the "Mantetsu Maru." The plaintiff left the Pilot Office by car at 10 minutes to 3, and arrived at the gangway of the ship at 3 minutes to 3. The bottom of the gangway was resting on the wharf, and according to the Quartermaster of the ship the top of the gangway was resting on the top of the bulwark. It appears that the gangway was not in that position for the purpose of receiving the pilot, who was expected to arrive from the sea-side. It was in fact about to be lowered to the wharf, as the gangway was the property of the Harbour Board. According to the defendants' evidence, the plaintiff came running up the gangway, and that caused the gangway to slip, with the result that the sudden fall must have caused the lowering rope to break. The gangway fell to the ground, with the plaintiff on it, and the plaintiff suffered the injuries in respect of which he claims damages in this action. The lowering rope is in evidence as Ex. 1. Mr. Nightingale, who has had 22 years experience of carrying out tests of cordage for the Admiralty, says that there are no internal or external defects, and that the rope is a normal 3 inch manilla rope, which had probably been in use for 3 or 4 months. The evidence is that the rope was new 5 months before this accident.

The Statement of Claim alleges that the plaintiff was an invitee. I think it must be accepted that if a gangway is in the position which this gangway was, and no warning is given that the gangway is not to be used, that is an invitation to use it. But it is the duty of an invitee to use reasonable care for his own safety. And the defence is pleaded that the plaintiff failed to use reasonable care because he failed to observe that the defendants' servants were engaged in unshipping the gangway.

In order to lower the gangway to the wharf the lashing ropes, which lash the gangway to the ship, must first be unfastened and removed, and the gangway is then lowered by means of the lowering rope (Ex. 1). It seems to me that the questions of fact which I have to determine are, firstly, what stage in this operation had been reached when the plaintiff boarded the gangway; and secondly, whether the plaintiff by the exercise of ordinary care (bearing in mind his experience of ships) could have seen that this operation was in progress. In the Master's report to the Wharf Superintendent, which was made on the same day, this accident is stated to have been caused by the lashing securing the gangway being carried away. I have no doubt from the evidence that before the plaintiff boarded the gangway one lashing rope had been

unfastened, and the other lashing rope was in process of being unfastened. A witness, who was standing on the wharf, says that he saw one of the crew with a rope in his hand, which appeared to be attached to the gangway. When the plaintiff was climbing the gangway his weight caused the gangway to fall from the bulwark. This caused the lashing rope which had been unfastened, and the other lashing rope which was in the man's hand, to run through the ring-holes; and the whole strain of the gangway with the plaintiff on it was taken by the lowering rope, which broke under it.

Upon the question of whether the plaintiff ought to have seen that the defendants' servants were unfastening the lashing ropes, the gangway was at an angle of 43° to the wharf and from the sketch it would appear that from the wharf the plaintiff would not have been able to see the lashing ropes being untied, even if he had arrived in time to see it of which there is no evidence. And from the evidence I think the most that he could have been expected to see was what Mr. Anderson saw, i.e. one of the crew standing with a rope in his hand, which appeared to be (and I have no doubt was) attached to the gangway. Even if he had seen this, I cannot think that he would have shewn a lack of ordinary care in boarding the gangway, having regard to all the circumstances. He knew that the ship was sailing at 3 p.m. He knew that he was expected. The defendants say that he was expected from the sea-side, but no reason has transpired for not expecting him equally from the wharf. The gangway was in a position which "invited" him to go up it. And nobody attempted to stop him—at any rate until it was too late. In the defendants' evidence (which was taken *de bene esse*) the plaintiff is said to have run up the gangway. But that is not pleaded as a particular of his alleged contributory negligence. It is not mentioned in the Master's report. And two witnesses who were watching from the wharf negative it. Again in the defendants' evidence it is said that the plaintiff was given a warning. But it is not suggested that he was giving the warning until it was too late. And again it is not mentioned in the Master's report or pleaded; and it is negatived by the witnesses who were watching from the wharf.

Upon the evidence I find the following facts:—

- (a) the gangway was in an unsafe condition owing to the lashing ropes having been unfastened;
- (b) no effective warning was given to the plaintiff;
- (c) in failing to give the plaintiff warning at a time when the gangway was not properly secured (the lashing ropes not being fastened), the defendants' servants were guilty of negligence;
- (d) the plaintiff shewed no lack of reasonable care in failing to see that the lashing ropes were not fastened or that the gangway was not properly secured.

The shipping company who are the defendants in this action, by an amendment to their pleading which was allowed on the first day of the hearing, have raised the defence of common employment. The doctrine of common employment, which has been abolished in England, is still the law here. The basis of the doctrine is that there is an implied term in the contract of service whereby a servant agrees to run the risk of harm due to the negligence or incompetence of his fellow-servants who are engaged in a common work. Thus if a pilot is to be regarded as the servant of the owners of the ship, and if the doctrine of common employment applies, a pilot is to be deemed to accept the risk of injury caused by the negligence of a member of the crew. Having regard to the number of ships which a pilot must board in the course of his duties, and to the fact that it is seldom that any member of ship's crew can be known to him, the doctrine would appear to be far removed from the reality of the relationship of the pilot to the crew.

It is clear from section 396(f) of the Merchant Shipping Ordinance that a pilot is compelled by law to take charge of a ship if he is required to do so. And the point at issue would appear to have been settled by the Court of Appeal decision in *Smith v. Steele*⁽¹⁾. *Smith v. Steele*⁽¹⁾ is authority for saying that because the plaintiff in this case had no freedom of choice with regard to this particular employment, being bound by law to undertake the work, there can be no implied term and the doctrine of common employment does not apply. But two cases have been cited which appear to be contrary to the decision in *Smith v. Steele*⁽¹⁾. One is a case in Scotland, *Thom v. Hutchinson Ltd.*⁽²⁾ of which the report is not available. The other is the case of *Kelley v. Shamrock Shipping Co.*⁽³⁾, which is a Court of Appeal decision. I find it difficult to understand this decision; and from the fact that the report does not mention *Smith v. Steele*⁽¹⁾ that case does not appear to have been referred to. So far as I am aware, the decision in *Smith v. Steele*⁽¹⁾ has not been overruled, and it continues to be quoted in the text books as good law.

I hold that the doctrine of common employment does not apply in this case for the following reasons. Firstly, upon the facts of this case it would appear to me to be altogether fictitious to hold that the plaintiff, in engaging (as required by law) to pilot the defendants' ship, impliedly accepted the risk that he might be injured as a result of the negligence of the defendants' servants. Secondly, *Smith v. Steele*⁽¹⁾ appears to be still good law in England, and a decision which common sense would indicate that I should follow. Thirdly, I can see no distinction in principle between the present case and the case of *Barrington*

v. Kent⁽⁴⁾, where the plaintiff was employed in a different department and on altogether dissimilar work from the workmen whose negligence had caused his injuries, and it was held that the doctrine of common employment did not apply. Fourthly, it would appear from the decision in *Alan France v. "Polartank"*⁽⁵⁾ that it is at least doubtful if the doctrine of common employment has ever applied except in cases where the plaintiff is a servant of the defendant in the sense that the latter is in a position to tell him the manner in which he is to perform his duties, which I cannot think was the case here. Therefore I hold that, assuming the plaintiff can be regarded as the servant of the defendants, the doctrine of common employment cannot apply so as to relieve the defendants of their liability for the negligence of their servants.

It is therefore unnecessary, for the purpose of a decision in this case, to determine the question of whether the plaintiff was a servant. But as the point has been raised it may be useful to consider it and express my view. In *Thom v. Hutchinson Ltd.*⁽²⁾ and *Kelley v. Shamrock Shipping Co.*⁽³⁾ it appears to have been considered that the pilot was the servant of the ship-owners and engaged in common employment with the ship's crew. But in the Lloyd's List report of the latter case, the facts which are material to this question are not set out. In the present case the plaintiff is a member of the Singapore Pilot Association. If that makes him a servant of the Association, the case would seem to fall directly within the ambit of *Alan France v. "Polartank"*⁽⁵⁾. But I do not think he is a servant of the Association. I think that the Singapore Pilot Association is an association of individuals, who are in the position of independent contractors. By their Articles they agree to subject themselves to certain common rules, for their mutual benefit, and to pay their individual earnings into a common pool. Upon the question of whether a pilot, in his relations with the ship-owner, is in the position of a servant or an independent contractor, the degree of control which the Master, as the ship-owner's agent, has over the pilot's work must be the decisive factor. It appears to me that the service which a pilot contracts to undertake is to take control of the navigation of the ship. He gives his orders to the Master. I cannot see that the Master, has any more control over a pilot than a patient has over his doctor or a client over his solicitor. A pilot may be the servant of a third party, e.g. a Harbour Board, as I suspect was the case in the two authorities cited; but that is not the case here. But unless a shipping company maintains a pilot on its salaried staff (I do not know if there are such cases) I find it difficult to understand, having regard to the nature of a pilot's duties, how a ship-owner and a pilot

can be in the relationship of master and servant unless that relationship is created by reason of the pilot's relations with a third party.

I hold that the plaintiff is entitled to damages, which remain to be assessed.

Judgment for the plaintiff.

TAN KIM CHANG v. REGINA

[A. Cr. J. (Whitton, J.) July 29, 1953]

[Singapore — Magistrate's Appeal No. 65 of 1953]

Road traffic — Negligent driving — Singapore Traction Ordinance (Cap. 109), s. 58 — Degree of negligence required — Test to be applied.

The appellant was driving a bus in the centre traffic lane and was overtaking a trishaw which was in the nearside lane. At the same time another bus on the offside lane began to overtake the appellant's bus, and the appellant swerved slightly to the left and in so doing he hit the trishaw.

Applying the test laid down by Goddard L.C.J. in *Simpson v. Peat* (1), the learned Magistrate found that the appellant was not exercising the degree of care and attention that a reasonable and prudent driver would exercise in the circumstances, and accordingly convicted him.

Held: although it is correct to apply the test laid down in *Simpson v. Peat* (1), the negligence should also amount to a crime against the State and to conduct deserving punishment.

To constitute the offence of driving negligently under section 25(2) of the Road Traffic Ordinance and section 58 of the Singapore Traction Ordinance, it is not necessary to establish any degree of negligence, but the Court should be satisfied there was negligence which merited punishment.

In this case, although the appellant was not exercising the degree of care which a prudent driver would exercise in the circumstances, his conduct was not such as to deserve punishment.

[Editorial Note:— In *Kuah Koon Teng v. Regina* (Singapore Magistrate's Appeal No. 243 of 1952 unreported) which was an appeal against a conviction for negligent driving the appellant had cut in front of another bus to avoid an oncoming car. There was insufficient evidence of racing. Brown, J. held that the degree of negligence required for an offence under section 58 of the Singapore Traction Ordinance is not the same as for an offence under the Penal Code. This section however is a penal section, and the degree of negligence must be such that it is deserving of punishment. Although the appellant was at fault in cutting in, his act of cutting in did not amount to such a degree of negligence as to deserve punishment.]

Cases referred to:—

(1) *Simpson v. Peat* (1952) 1 All E.R. 447.

(2) *Chow Koek v. Public Prosecutor* (1940) M.L.J. 103.

(3) *R. v. Bateman* (1925) 94 L.J.K.B. 791.

MAGISTRATE'S APPEAL. 19 Cr. App. R. 8.

J. D. Donnelly for the appellant.

T. Mahony (Crown Counsel) for the respondent.